

## HUMAN SERVICES BOARD

## INTRODUCTION

## FINDINGS OF FACT

1. In 1985, the petitioner was criminally charged with assaulting his wife and his two stepchildren, R.C. and T.C. In exchange for the state's attorney dropping the criminal charges, the petitioner, who was represented by an attorney, agreed to relinquish custody to DCF/FSD (then SRS) of his two stepchildren under two Child in Need of Supervision (CHINS)

petitions in which he was a named party. The petitioner's two younger biological children were not the subject of the petition.

2. On November 19, 1985, the juvenile Court made the following pertinent findings of fact in the two CHINS proceedings:

Regarding the petition on R.C.:

- A) R.C., a fifteen-year-old boy, has been "terrified by assaultive and belittling treatment at the hands of [the petitioner]."
- B) R.C. "bordered on psychotic. His emotional disturbance was marked by docility, lack of self-esteem and a general feeling of inadequacy. He was withdrawn and expected that others would reject and isolate him."
- C) R.C. "has three siblings, each of which has serious psychological problems caused by [the petitioner's] behavior toward them."
- D) R.C. "blames himself for the attention focused on the family."
- E) [The petitioner] "uses manipulation, denial, minimalization and externalization as techniques to avoid having to take any responsibility for his destructive violence."
- F) R.C. "remains a child in need of special therapeutic services and absolute safety from violence and fear if he is to develop a healthier personality, diminish his anxiety, develop adequate self-esteem and coping skills, avoid a psychotic break and keep from becoming a child abuser like [petitioner]."

With regard to T.C.:

- A) T.C., a fourteen-year-old girl, "is regressed in social functions to a much younger age. One of her main joys is coloring with a much younger sister."
- B) [The petitioner] "presents the constant threat of sexually inappropriate, aggressive behavior toward T.C."
- C) T.C. has three siblings, "each of which has serious psychological problems caused by [petitioner's] behavior toward them."
- D) T.C. "is a severely abused and deprived child. She has poor self-esteem, is withdrawn and regressed . . . anxious and confused . . . lacks the ego strength to understand clearly what has happened to her."
- E) T.C. has "low self-confidence and continues to live in fear" and "avoids being near her stepfather."

3. The petitioner did not contest or appeal those findings.

4. DCF/FSD placed the petitioner in its child abuse registry for abusing the four children (his two stepchildren and two biological children) based on the above findings of the court. The petitioner recently requested expungement of those findings saying that they are not substantiated.

5. DCF/FSD provided the Board and the petitioner with copies of the Court's 1985 findings and asked that they be adopted as findings in this proceeding. The petitioner was given over two months to object to or to respond to DCF/FSD's request but he did neither.

6. The juvenile court's findings regarding R.C. and T.C. are adopted as findings by the Board for purposes of the substantiation hearing.

ORDER

The petitioner's request to expunge the substantiations regarding his step-children R.C. and T.C. is denied. The request to expunge the substantiations for his two younger biological children is remanded for the presentation of evidence at hearing.

REASONS

The petitioner has made application for an order to expunge a substantiation of abuse placed by DCF/FSD (then SRS) in its registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

- (H) A person may, at any time, apply to the Human Services Board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is

based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected. 33 V.S.A. § 4912 (10). The first issue in this appeal is whether the Commissioner can meet his burden of showing that he had accurate and reliable information by relying upon the findings of a juvenile court.

When considering this issue in prior appeals, the Board has adopted the test set out in Trepanier v. Geatting Organized, Inc. 155 Vt. 259 (1990) to determine whether it is precluded (collaterally estopped) by the findings in a CHINS proceeding from making its own findings in the context of an expungement hearing. See Fair Hearing Nos. 11,444, 12,309 and 13,432. The criteria set forth by the Vermont Supreme Court for adopting the prior tribunal's findings are as follows:

- (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action.
- (2) the issue was resolved by a final judgment on the merits;
- (3) the issue is the same as the one raised in the later action;
- (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
- (5) applying preclusion in the action is fair.

Id., at 265.

Applying the first prong of that test to this matter, the petitioner was clearly a party to the CHINS proceedings brought against R.C. and T.C. However, the two younger children mentioned in the CHINS petition were not named parties in that proceeding. Therefore, the test is met with regard to R.C. and T.C. but not with regard to the two younger children. The second prong is also met for R.C. and T.C. because the CHINS judgment was a final one, agreed to by the petitioner twenty years ago and never appealed. Whether or not R.C. and T.C. had been abused by the petitioner is the same issue raised in the CHINS action and this appeal, a requirement of the third prong. The fifth prong is also met because the petitioner was represented by an attorney in the action and had a fair and full opportunity to contest the findings. Finally, the petitioner does not argue that it is unfair to use these findings against him. It would certainly be unfair for DCF/FSD to have to find witnesses to retry the matter some twenty years after its occurrence.

As the test for preclusion is met with respect to R.C. and T.C., the Board is bound by the findings of the juvenile court. The only remaining question for the Board is whether those findings constitute abuse as it is defined for purposes of the child protection registry. Abuse and neglect are

specifically defined in the regulations which are set out in pertinent part as follows:

- (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.
- (3) "Harm" can occur by:
  - (A) Physical injury or emotional maltreatment;
- (4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.
- (5) "A person responsible for a child's welfare" includes the child's parent; guardian; foster parent; any other adult residing in the home who services in a parental role.
- . . .
- (7) "Emotional maltreatment" means a pattern of malicious behavior which results in impaired psychological growth.
- (8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a

sexual conduct, sexual excitement or  
sadoomasochistic abuse involving a child.

With regard to R.C., the juvenile court found that the petitioner terrified him with his assaultive and belittling behavior and that R.C. was suffering severe (bordering on psychotic) psychological problems as a result. That finding constitutes abuse under paragraphs (2), (3) and (7) above which includes as abuse a child's caretaker's causing him harm through emotional maltreatment or a pattern of malicious behavior which results in impaired psychological growth.

With regard to T.C., the juvenile court found that the petitioner poses a constant threat of sexually inappropriate and aggressive behavior towards her which has led to her becoming withdrawn, anxious, regressed, confused and fearful of her stepfather. That finding also constitutes abuse under paragraphs (2), (3), (4) and (7) above which includes as abuse a child's caretaker's causing her harm through emotional maltreatment or a pattern of malicious behavior which results in impaired psychological growth and also placing her in significant danger of continued emotional maltreatment or sexual abuse. DCF/FSD has met its burden of showing the accuracy of facts which constitute abuse under the child protection statute with regard to R.C. and T.C.



Therefore, the substantiation must be upheld with regard to those two children. 3 V.S.A. § 3091(d), Fair Hearing Rule 17.

DCF/FSD had asked that in the event that the finding in the CHINS petition is not sufficient to meet its burden for the two younger children, that it be allowed to present independent evidence of the abuse of those two. That request is granted and the matter remanded for the taking of evidence for those two younger children.

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